

STATE OF MICHIGAN
COURT OF APPEALS

TRACI STEPHENS, as next friend to JUSTICE
STEPHENS, a minor, and TRACI STEPHENS, in
her individual capacity,

Plaintiff-Appellee,

v

RUBEN DANIELS MIDDLE SCHOOL,

Defendant-Appellant.

UNPUBLISHED
June 13, 2013

No. 311311
Saginaw Circuit Court
LC No. 12-015497-NO

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this governmental immunity dispute, defendant school appeals by right the trial court's denial of its summary disposition motion under MCR 2.116(C)(7). We reverse, on two grounds: (1) plaintiff did not provide the statutorily mandated notice to pursue a claim under the public building exception to immunity, MCL 691.1406; (2) plaintiff did not state a cognizable claim of negligence or gross negligence against defendant.

Plaintiff's claim arose after 12-year-old Justice Stephens attended a rehearsal for a talent/fashion show in the Ruben Daniels Middle School auditorium. Although the rehearsal was school-sponsored, Justice was apparently not a rehearsal participant. Instead, Justice was running down an auditorium aisle. His thigh struck the arm of a metal chair, causing a gash.

Approximately five months later, plaintiff's counsel sent a letter to defendant. The letter stated that counsel was representing Justice and his mother, Traci Stephens, with regard to "injuries sustained." Plaintiff later filed a complaint against defendant, asserting claims of "governmental liability," "gross negligence," and "physical manifestations of mental anguish." Defendant responded with a summary disposition motion. The trial court denied defendant's motion, stating, "Well, I can see serious issues on the governmental immunity, but I'm going to deny it at this time and let discovery go forward. If you [plaintiff] can't clean it up we might end up a summary disposition, but I'll give you a chance." Defendant filed this appeal.

A trial court's order that denies governmental immunity under MCR 2.116(C)(7) is a final order, appealable by right. MCR 7.202(6)(a)(v); *Conmy v Dept of Transp*, 272 Mich App 138, 139-140; 724 NW2d 297 (2006). In this case, the trial court denied defendant's governmental immunity motion. Accordingly, this Court has jurisdiction over defendant's appeal.

Plaintiff's complaint appears to assert three separate claims: a general negligence claim arising from the condition of the auditorium chairs; a gross negligence claim; and a claim for emotional distress. The trial court's ruling allowed each claim to proceed. We review de novo the trial court's ruling. *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011).

To avoid summary disposition on her claims, plaintiff was required to allege facts in avoidance of the Government Tort Liability Act, MCL 691.1401 *et seq.* *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). The Act renders governmental agencies immune from tort liability. See *Moser v Detroit*, 284 Mich App 536, 539; 772 NW2d 823 (2009). The general statute granting governmental immunity reads, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The act defines "governmental function" in pertinent part as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). "The term 'governmental function' is . . . broadly construed." *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The parties agree that defendant is a governmental entity and that Justice was injured on governmental property. Accordingly, to pursue a general negligence claim against defendant, plaintiff was required to assert a claim actionable under the public building exception to governmental immunity, MCL 691.1406. The public building statute requires plaintiffs to serve notice on defendants, as follows:

As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant. [MCL 691.1406.]

In this case, Justice was injured on December 7, 2010; the notice was due no later than April 6, 2011.

Plaintiff's letter to defendant is dated May 16, 2011, and is stamped "Received" as of May 23, 2011. Both of these dates are well past the 120-day time limitation. Moreover, even if plaintiff's letter had been timely, the letter would not fulfill the notice requirement, because it lacks the statutorily mandated information. The letter does not identify the alleged public building defect, it does not specify the location of the alleged defect, it does not describe the alleged injury, and it does not name any witnesses to the incident. Cf. MCL 691.1406. Because plaintiff failed to provide the requisite notice, the trial court was required by statute to dismiss plaintiff's claim arising from negligence or defects related to the auditorium seating. See *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 81-82; 782 NW2d 514 (2010).

The trial court also erred by allowing plaintiff's gross negligence claim to proceed. Although governmental employees may be liable for gross negligence under certain circumstances, a governmental entity cannot be liable if the entity is engaged in a governmental function. MCL 691.1407(1). "The operation of a public school is a governmental function."

Stringwell v Ann Arbor Pub Sch Dist, 262 Mich App 709, 712; 686 NW2d 825 (2004). In this case, plaintiff did not name any governmental employee as a defendant. Plaintiff named only the school, which is a governmental entity. Plaintiff thus did not present a viable claim for gross negligence, and the trial court should have dismissed plaintiff's claim.

In the trial court, plaintiff's counsel contended that plaintiff had stated a claim pursuant to *Sherry v East Suburban Football League*, 292 Mich App 23; 807 NW2d 859 (2011). In *Sherry*, this Court held that the trial court erred by granting summary disposition in favor of a nonprofit youth football league, because there were factual issues regarding the league's involvement in a cheerleader's injuries. *Id.* at 30.

To the extent the trial court in this case relied on *Sherry*, the reliance was erroneous. The *Sherry* defendants were not governmental entities; they were a nonprofit youth football league, a football club affiliated with the league, and various individuals affiliated with the cheerleading program for the league. *Id.* at 25. Unlike the governmental immunity motion in this case, the defendants' summary disposition motions in *Sherry* were brought pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). 292 Mich App at 26. Nothing in the *Sherry* decision indicated that governmental entities may be held liable for negligence or for gross negligence.

To the contrary, the *Sherry* decision expressly distinguished public entities from private entities, and further distinguished individual liability from entity liability. The Court explained that the ordinary negligence standard "applies in cases alleging negligence on the part of nonparticipating coaches and organizations involved in *privately sponsored* recreational activities." 292 Mich App at 29 (emphasis added). "The Court further stated, "[t]he gross-negligence standard applies in cases involving *coaches* of publicly sponsored athletic teams who are entitled to governmental immunity." *Id.* These statements confirm that the *Sherry* decision pertains only to negligence claims against private entities. The decision is inapplicable to governmental immunity issues.

Given our conclusion that plaintiff failed to present any cause of action in avoidance of governmental immunity, we need not separately address plaintiff's claim for emotional distress. Absent a valid cause of action, plaintiff's claim for emotional distress must fail.

Reversed and remanded for entry of summary disposition in favor of defendant under MCR 2.116(C)(7). We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell